SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1388

KNOX GLASS, INC., a corporation,
Petitioner,

v.

BOWSER AND CAMPBELL, a partnership, and LLOYD H. BOWSER and STELLA CAMPBELL, doing business as BOWSER AND CAMPBELL, a partnership,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Knox Glass, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered February 5, 1968, reversing judgment in favor of petitioner against respondents, Bowser and Campbell, a partnership, and Lloyd H. Bowser and Stella Campbell, doing business as Bowser and Campbell, a partnership, and remanding the case to the United States District Court for the Western District of Pennsylvania for further proceedings consistent with their opinion.

CITATION TO OPINIONS BELOW

The opinion of the District Court is reported at 264 F. Supp. 522 and is printed in Appendix C hereto. The opinion of the Court of Appeals is printed in Appendix A hereto, and is not yet reported in the official reports.

JURISDICTION

The judgment of the Court of Appeals, printed in Appendix B hereto, was entered February 5, 1968. On March 4, 1968, the Court of Appeals stayed its mandate to enable petitioner to apply for certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE QUESTIONS PRESENTED

1. Should the rule of construction adopted by this Court for those sections of the Interstate Commerce Act which prohibit discrimination in rates charged by common carriers be applied in determining the liabilities of a shipper to a contract motor carrier for additional charges where the Schedule of Charges filed by such carrier contains an inadvertent omission affecting the amount of charges to be collected?

2. Should not Section 218(a) of the Interstate Commerce Act, being a remedial statute, be construed to give primary emphasis and effect to the private contract rights of the parties as against a literal construction which produces an unconscionable and absurd result?

STATUTE INVOLVED

The statute involved is Section 218(a) of the Interstate Commerce Act, Pt. II, added by 49 Stat. 561 (1935), as amended, 49 U.S.C. §318(a). It is printed in Appendix D hereto.

STATEMENT

This is an action brought by respondents, a contract motor carrier, against petitioner-shipper to collect additional freight charges based on the alleged failure of the respondents to collect, and the petitioner to pay, charges in accordance with a Schedule of Charges filed by the respondents with the Interstate Commerce Commission. (Applts' App. 3a) The amount of the charges claimed was stipulated by the parties. (Applts' App. 38a) The jurisdiction of the District Court was invoked under 28 U.S.C. §1337 as an action arising under an Act of Congress.

The respondents, Bowser and Campbell, a partnership, and Lloyd H. Bowser and Stella Campbell, doing business as Bowser and Campbell, a partnership ("Bowser and Campbell"), were at all times relevant herein a contract motor carrier regulated by the applicable provisions of the Interstate Commerce Act, Pt. II, added by 49 Stat. 543 (1935), as amended, 49 U.S.C. §§301-327. (Applts' App. 19a)

Petitioner, Knox Glass, Inc. ("Knox"), is a corporation organized under the laws of the Commonwealth of Pennsylvania and has its principal office in Knox, Pennsylvania. (Applts' App. 3a) At all times

relevant herein, petitioner was a manufacturer of glassware with manufacturing plants located at Knox, Marienville and Parker, Pennsylvania, and warehouse facilities at Kane and Sheffield, Pennsylvania. (Applts' App. 19a)

For over thirty years prior to the institution of this action in January, 1966, Bowser and Campbell had served Knox and its predecessor, Knox Glass Associates, Inc., as a contract motor carrier in connection with the shipment of glassware manufactured by Knox. (Applts' App. 83a) During the period of time here involved, January, 1960 to January, 1964, Bowser and Campbell had performed these services under a written transportation agreement dated May 14, 1958. (Applts' App. 252a) According to that agreement, respondents were to be compensated for their services according to "'MC 1218, MF-I.C.C. No. 3, Schedule of Charges for Transportation, as a Contract Carrier,' supplements thereto and reissues thereof." That Schedule of Charges (Applts' App. 236a) became effective May 1, 1958, and was in effect until January 25, 1964. (Applts' App. 245a)

During the parties' long period of association, it was the practice of the carrier to stop its trucks at one or more Knox plants, as necessary, to complete the loading of glassware begun at another Knox plant. (Applts' App. 87a) Similarly, Bowser and Campbell would stop a shipment in transit at various points for partial unloading. This practice had been in effect prior to the date that contract motor carriers came under federal regulations in 1935 and continued thereafter.

Statement.

This case arose because in 1958 the carrier for the first time adopted a minimum load charge in its Schedule of Charges. Unfortunately, when the carrier published the Schedule of Charges, which was filed with the Interstate Commerce Commission under Section 218(a), it inadvertently and mistakenly omitted a rule affording shipper the privilege of stopping to complete loading, although the Schedule did contain a rule for stopping for partial unloading. (Applts' App. 241a) The Schedule as published assumed that each shipment had a minimum weight. The absence of a rule affording the privilege of stopping to complete loading made each stop for loading a new shipment subject to the minimum weight requirement. Thus, as written, the Schedule did not permit the aggregation of weights of individual loadings in computing freight charges. This could and did result here in claims for charges for hauling phantom freight.

Notwithstanding the erroneous omission from the Schedule of a rule permitting stopping in transit to complete loading, Knox paid Bowser and Campbell, and they accepted, an agreed charge of $6.00 (later $10.00) for the privilege of such stopping, in addition to the applicable hauling charges computed on the aggregate weight of the shipment. (Applts' App. 19a) There was no dispute that the parties had agreed that in computing freight charges Knox was to have the privilege of stopping to complete loading. That this privilege was part of the transportation agreement was admitted at the trial by Mr. Harold R. Bowser, respondents' principal witness. (Applts' App. 74a) Moreover, this was admitted by respondents in the agreement

executed between the parties dated August 21, 1964. (Applts' App. 256a) Furthermore, as discussed below, the omission in the Schedule was promptly ratified when called to the carrier's attention.

During the period involved in these proceedings, two common carriers, W. I. Womeldorf & Sons and Motorway Corporation, offered the same transportation service with stop-off for loading privileges at comparable and competitive rates and charges as were actually paid by Knox for the services provided by Bowser and Campbell. (Applts' App. 271a, 282a)

During an investigation by the Interstate Commerce Commission during the fall of 1963, the Commission's inspectors found that respondents' billings were computed by using the aggregate weight of loads regardless of the number of points where loading was accomplished. As a result of this investigation, Bowser and Campbell claimed that they were "ordered" by the Commission to collect undercharges from Knox. Very shortly after the investigation, Bowser and Campbell amended the Schedule, effective January 25, 1964, to reflect the actual agreement and practice of the parties. (Applts' App. 245a) Despite this amendment, separate criminal actions were brought by the Commission against Bowser and Campbell in March, 1964, and against Knox in June, 1964, alleging violations of Section 218(a) of the Interstate Commerce Act. (Applts' App. 90a, 110a)

Because of these criminal charges, Knox consulted S. Sidney Eisen, a transportation consultant, who after meeting with respondents' representative and the In-

terstate Commerce Commission, prepared an agreement wherein respondents acknowledged that the freight charges collected were the charges agreed upon and, in addition, released Knox from further claim for such charges. (Applts' App. 256a) At a later meeting in Washington, D.C., in the fall of 1964, Mr. Bowser and his counsel were informed by representatives of the Interstate Commerce Commission that the Commission was not concerned whether respondents pursued a claim for the alleged undercharges. (Applts' App. 123a)

The District Court, after a trial without a jury, entered judgment for petitioner. (Appendix C, p. C13) The District Judge, sitting as the finder of fact, stated:

> "By clear, precise and convincing evidence it was proved that Carrier, which seeks to enforce the Schedule of Charges, a part of the written agreement, has admitted and acknowledged that it did not express in the Schedule of Charges what the parties intended, and that what the parties intended was omitted from the Schedule of Charges by inadvertence and mistake." (264 F. Supp. at 526)

In view of his findings, Judge Marsh concluded that to permit respondents to recover would "unduly and unconscionably enrich" respondents and that such a result would be contrary to the provisions of the Interstate Commerce Act which regulate contract motor carriers.

Upon appeal by respondents to the Court of Appeals for the Third Circuit, the judgment in favor of

petitioner was reversed and the cause remanded for further proceedings consistent with the opinion. (Appendix B, p. B1) The majority opinion recognized the distinctions in policies underlying regulation of contract motor carriers as opposed to common motor carriers, but nevertheless held that such policy distinctions must give way "in order to preserve the integrity of the filed rates." (Appendix A, p. A7) In a concurring opinion, Judge Van Dusen emphasized the unusual circumstances presented, including the admissions by the respondents and the absence of any destructive competitive practices, and said that petitioner may well file a petition for a writ of certiorari to this Court in order to "reach the fair and just result achieved by the opinion of the able district judge. . . ." (Appendix A, p. A11)

Hence this petition.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals, in holding that common carrier tariff principles ought to be applied to permit a contract carrier by motor vehicle to recover undercharges based on an erroneous Schedule of Charges, raises important and substantial questions concerning the private contractual rights of parties subject to Part II of the Interstate Commerce Act. Although this Court has interpreted Section 6 of Part I of the Interstate Commerce Act on numerous occasions, it has not heretofore considered the correlative and equally important section, 218(a), of Part II regulating the filing of schedules of charges by contract motor carriers. The decision of the Court of Appeals was based solely on the application of the decisions by this Court in *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, and *Pittsburgh, C., C. & St. L. Ry. v. Fink*, 250 U.S. 577, wherein it was held that no deviation from tariffs filed by common carriers under Section 6 would be permitted under any pretext.

In reaching its conclusion, the Court of Appeals also placed itself in conflict with the recent decision by the Court of Appeals for the Seventh Circuit in *National Van Lines, Inc. v. United States*, 355 F. 2d 326 (1966). Moreover, the decision ignored the teachings of this Court commencing with *United States v. Kirby*, 74 U.S. (7 Wall.) 482 that the reason of the law should prevail over its letter in those cases that would otherwise result in unjust, oppressive, unreasonable or absurd conclusions.

I.

The Decisions of This Court Relating to the Enforcement of Tariffs Filed by Common Carriers Under Section 6 of the Interstate Commerce Act Do Not Necessarily Apply to Civil Actions Arising Under an Erroneous Schedule of Charges Filed by a Contract Carrier Under Section 218(a) of This Act.

In 1887, Congress enacted the Interstate Commerce Act to combat discriminatory practices by the railroads. To secure compliance with the Act, Section 6 provided that common carriers were to file their tariffs with the Interstate Commerce Commission. Within a few years following its enactment, this Court handed down a series of decisions interpreting that section of the Act. In *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, it was held that a tariff filed with the Commission was to be treated as if it were a statute, and therefore unaffected by any private agreement between the shipper and carrier. Similarly, it was held in *Pittsburgh, C., C. & St. L. Ry. v. Fink*, 250 U.S. 577, that the only legal charge which could be collected by a common carrier was the rate duly filed with the Commission. Thus any collection by a common carrier of a greater or lower rate than that filed under the tariff was viewed as discriminatory and in violation of Section 6.

This was the state of the law concerning the collection of overcharges or undercharges when the Motor Carrier Act was enacted in 1935. The Motor Carrier Act, 49 Stat. 543, as amended, 49 U.S.C. § § 301-

327, renamed Part II of the Interstate Commerce Act in 1940, brought motor vehicles operating in interstate commerce under federal regulation for the first time. In so doing, however, Congress recognized the need for specialized and individualized motor carrier service in addition to common motor carrier service. Thus it created in Section 203(a)(15) a new class of carrier known as a contract carrier by motor vehicle. This class was intended to include those carriers who furnished transportation services under individual contracts of carriage designed to meet the distinct needs of shippers.

Since a common carrier by motor vehicle must offer its services to the public on a nondiscriminatory basis as in the case of other common carriers, the rationale of the cases construing Section 6 as applied to the latter group of carriers may well apply to common motor carriers to achieve a uniform policy of nondiscrimination among shippers. However, the principle of protecting the public from discriminatory practices, including the lack of uniform rates, is the antithesis of the purpose of regulating contract motor carriers, because such carriers are expressly permitted to discriminate freely among shippers under Section 218(a). Whereas the clear statutory intent in regulating common carriers was the prohibition of unjust discriminations in the rendition of services under similar circumstances and conditions, the statutory intent behind the regulation of contract carriage was to protect common carriers from cut-throat competition. In fact, the Court of Appeals recognized this vital distinction when it stated:

> "It is true that the regulation of contract carriers is not designed to prevent discrimination among shippers, as it is in the case of common carriers. *The purpose in regulating contract carriers is to prevent destructive competition between contract carriers and common carriers and among the contract carriers themselves.*" (emphasis added) (Appendix A, pp. A5-6)

Yet the Court of Appeals, in reversing the judgment of the District Court in favor of the petitioner, held that the respondents could recover undercharges arising under an erroneous Schedule of Charges despite the fact that the rates actually paid by petitioner were competitively comparable to those charged by common carriers operating in the same vicinity as the respondents.

This Court has frequently said that interpretations of statutes by agencies charged with their administration are entitled to very great weight. *E.g., Skidmore v. Swift & Co.,* 323 U.S. 134; *Fawcus Mach. Co. v. United States,* 282 U.S. 375. Accordingly, even a cursory examination of the decisions by the Interstate Commerce Commission involving contract carriers will reveal an interpretation not consonant with the inept approach of the Court of Appeals. For example, in *Ex Parte M.C. 12, Contracts of Contract Carriers,* 1 M.C.C. 628 (1937), the Commission stated that the purpose of contract carrier regulation was:

> "[T]o promote and protect adequate and efficient common-carrier service by motor vehicle in the public interest, and the regulation of contract carriers is designed and confined with that view in end. . . .

> The patent object of Congress is to protect the common-carrier against cut-throat competition." *Id.* at 629.

If the intent of Congress in regulating contract carriers was to promote and protect common carriers, then the policy inherent in common carrier regulation of preserving the integrity of filed rates should not be controlling in contract carriage. In contract carriage, the individual contract between the shipper and contract carrier should control the private rights of the parties as long as such contract does not violate the fundamental policies of Congress contained in Section 218(a). Therefore, although the Interstate Commerce Commission is understandably concerned with the enforcement of the filing provisions of Section 218(a), neither the Commission nor Congress ever intended that a shipper should be liable in a civil action for charges other than those provided in the agreement between the parties unless common carriers will be injured thereby.

Furthermore, there is no need to enforce the rates as filed in the Schedule of Charges to prevent discrimination, since contract carriers are expressly permitted by Section 218(a) to discriminate among shippers. Thus, when the Court of Appeals speaks of its decision as necessary in order to discourage "pressure by powerful shippers for discounts", it fails utterly to perceive the theory of contract carrier regulation, particularly where the alleged undercharge was admittedly a mistake and not injurious to competing common carriers.

The Court of Appeals is simply declaring a fiction to be policy when it states, after reviewing common and contract motor carrier regulations, that:

> "This difference, however, reflects only a partial factor and is not enough to justify a disregard of the general policy that the rate filed must be observed, a policy which pervades the regulation of contract as well as common carriers and which is enforced by permitting any undercharges to be recovered in order to preserve the integrity of the filed rates." (Appendix A, p. A7)

No such policy pervades the regulation of contract motor carriers.

Unless the decision of the Court of Appeals is reversed, a shipper by contract motor carriage will be effectively denied any right to challenge unjust and unreasonable rates which may be intentionally or inadvertently published by a contract carrier in its schedule of charges. By virtue of the decision, a contract shipper will be bound by the published rates irrespective of the actual agreement between the parties and the reasonableness of the rates as filed. Such a result is untenable since even a shipper by common carriage has a right to recover unreasonable and unjust charges paid in accordance with the tariff rates in an action for the recovery of reparations under Section 204(a)(2) of the Interstate Commerce Act. In contrast, shippers by contract carriage enjoy no similar right. Since contract carriers and shippers are free to bargain on rates, it is only reasonable that any disputes between the parties concerning rates would be settled in accordance with the terms of their agreement. If the rates offered by the contract carrier are unreasonable, the shipper need not enter into a transportation agreement. It is submitted, therefore, that Congress would have given contract

shippers the same right as shippers by common carriers have to recover reparations if it had intended that contract shippers would be bound by unreasonable and unjust rates filed in an erroneous schedule of charges.

For these reasons, it is necessary for this Court to review the decision of the Court of Appeals in order to relieve the uncertainty created by its wooden application of common carrier principles to contract motor carriers.

II.

The Decision of the Court of Appeals Is in Conflict With the Decision of the Court of Appeals for the Seventh Circuit in National Van Lines, Inc. v. United States, 355 F. 2d 326 (1966).

In *National Van Lines, Inc. v. United States,* 355 F. 2d 326 (7th Cir. 1966), the Court of Appeals reversed a decision by the United States District Court for the Northern District of Illinois upholding a declaratory order by the Interstate Commerce Commission. The Commission had held that a group of common motor carriers had charged rates in excess of, or different from, the tariffs filed with it by the carriers and therefore violated Section 217(b) of the Interstate Commerce Act.

In 1959, the common motor carriers filed a new set of tariffs with the Commission replacing a set of similar tariffs filed in 1957. In preparing the 1959 tariffs, however, the carriers inadvertently omitted a reference note which had appeared in the 1957 tariffs at the end of Section III which should have stated: "over 500 miles,

apply rates shown in Section II." Nothwithstanding this inadvertent omission, the carriers applied the rates which gave effect to the omitted reference note.

In early 1960, a shipper noticed the omission and immediately filed claims for overcharges. The shipper contended that Rule 23 of the tariff controlled on shipments in excess of 500 miles rather than Section II. Of course, application of Rule 23 rates would have resulted in substantially lower charges than application of the rates set forth in Section II. Thereafter, the Commission ordered an investigation to determine whether the rates charged by the carriers were different from the rates specified in 1959 tariffs. The Commission concluded, five members dissenting, that the common carriers had in fact overcharged the shippers because of the omitted reference note from the tariff. *Applicability of Rates on Household Goods,* 315 I.C.C. 537 (1962). The District Court upheld the declaratory order.

A three-judge panel of the Court of Appeals for the Seventh Circuit unanimously reversed the decision of the Commission and the District Court. Recognizing that the *reference note was omitted through inadvertence,* as did the District Court in the case at bar, the Court of Appeals refused to apply the strict and harsh rule that a carrier, or a shipper, is absolutely bound by the rates filed in the tariff. Instead, the Court of Appeals found that the omission created an ambiguity or uncertainty in the tariff and stated:

> "Under such circumstances, we think the traditional rules of construction of written instruments are controlling in arriving at the proper application of the tariffs. The intention of the framers and

other considerations thus become relevant." 355 F. 2d at 332.

Upon consideration of the facts here, and noting that contract carriers are involved rather than common carriers, we believe a fortiori that the Third Circuit has placed itself in direct conflict with the Seventh Circuit on this important issue. Therefore, we urge the Court to resolve this unsatisfactory development in Federal case law.

An application of the criteria used in *National Van Lines* to resolve the ambiguity in the tariff to the instant facts reveals the inherent unsoundness of the decision of the Third Circuit. Among the criteria found to be controlling were the following:

1. The intention of the parties;

2. The avoidance of unjust, absurd or improbable results;

3. A construction which avoids a possible violation of law;

4. The practical application of the tariff by the interested parties; and

5. The resolving of any doubts in favor of the shipper.

Moreover, the case at bar requires an application of these fundamental rules of contract law for several other reasons. First, the application of contractual principles to a contract carriage situation is inherent in the concept of contract carrier regulation. The very definition of contract carriers in Section 203(a)(15) mandates such a conclusion. Secondly, there is no dis-

pute or doubt as to the intention of the parties. The respondents have expressly admitted that the Schedule of Charges did not reflect the terms of the agreement between the parties. Its amendment of the Schedule of Charges immediately following discovery of the omission confirms respondents' intention. Finally, upholding the intention of the parties will not cause injury to common carriers operating in the same area because the tariffs of the two common carriers in competition with the respondents already provide for the privilege of stopping in transit to complete loading.

Accordingly, the Court should review the rigid and sterile opinion of the Court of Appeals in order to remove the uncertainty arising from the conflict between the Third and Seventh Circuits.

III.

If the Body of Case Law Interpreting Section 6 of the Interstate Commerce Act Is Applicable to the Contract Motor Carrier Provisions of Section 218(a) of the Act, Then the Case at Bar Is Not Within the Spirit of Section 218(a), Although It May Be Within Its Letter.

Section 218(a) of the Act provides, *inter alia,* that no contract carrier "shall demand, charge, or collect compensation for such transportation different from the charges filed" in the schedule of charges. (Appendix D, p. D2) The Court of Appeals construed this language to forbid absolutely any deviation, albeit an inadvertent and harmless one, from the Schedule of Charges. By so construing one narrow provision of Section 218(a), the Court of Appeals initially violated the cardinal rule of

statutory construction that all sections of an act in pari materia are to be construed together and that no one portion should be singled out for special emphasis. *E.g., White v. United States,* 305 U.S. 281.

Addressing itself to the inequity of holding the petitioner liable for charges in a civil action where the admitted terms of the agreement explicitly prohibited such charges, the Court of Appeals stated:

> "Such instances of hardship may not be permitted to destroy the more far-reaching need to maintain respect for the rates established under the Commission's procedure and which other shippers and contract and common carriers alike must be able to rely upon as realistic facts rather than a screen which conceals illegal private practices." (Appendix A, p. A9)

Petitioner hastens to point out that there is not one scintilla of evidence in the record to support a conclusion that the filing of the Schedule of Charges was a screen to conceal illegal private practices. Moreover, as Judge Van Dusen aptly states in his concurring opinion, all of the cases cited by the majority in support of their view, namely, *A & F Trucking Corp. v. Liggett Drug Co.,* 253 F. Supp. 699 (S.D.N.Y. 1966); *Bottemueller v. Wilson & Co.,* 57 F. Supp. 766 (W.D.Mo. 1944) and *Minton v. General Shale Products Corp.,* 52 Tenn. App. 60, 371 S.W.2d 808 (1963), involved deliberate attempts to evade payment or collection of rates set forth in the filed schedule of charges. Thus these cases are far from authoritative precedents.

It is fundamental that all laws should receive a sensible construction. Moreover, a statute should be

interpreted so as to further the intention of the enacting body. This is especially vital where the language is broad and far-reaching. This Court, in the leading case of *United States v. Kirby,* 74 U.S. (7 Wall.) 482, cautioned against bringing a situation within the letter of a statute if it were not also within its spirit:

> "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter." *Id.* at 486-87.

Likewise, in *Sorrells v. United States,* 287 U.S. 435, and *Hawaii v. Mankichi,* 190 U.S. 197, this Court stated it was entirely proper to imply exceptions in a statute to obviate a construction which would otherwise be unjust, unreasonable or absurd. This is especially true where the circumstances surrounding the enactment of the statute makes it unreasonable to assume that the legislature intended such a situation to fall within the statute. *Church of The Holy Trinity v. United States,* 143 U.S. 457. We believe that it is clear beyond a reasonable doubt that Congress in enacting Section 218(a) of the Interstate Commerce Act was concerned solely with protecting the competitive rights of common carriers. If so, the case at bar is certainly not within the spirit of the Act.

In *Perry v. Commerce Loan Co.,* 383 U.S. 392, *rehearing denied,* 384 U.S. 934, this Court stated that where the plain meaning of a statute will lead to a result which is unreasonable and plainly at variance

with the legislative policy underlying the statute, it will follow the purpose of the statute rather than its literal words. Similarly, where an adherence to the strict letter of a statute will lead to absurd consequences, the spirit of the act should prevail over its letter. *Helvering v. Hammel,* 311 U.S. 504.

Part II of the Interstate Commerce Act is a remedial statute and, as such, should be construed liberally. *McDonald v. Thompson,* 305 U.S. 263, *rehearing denied,* 305 U.S. 676. The opinion of the Court of Appeals, however, is far from a liberal interpretation. A liberal construction of Section 218(a) should promote even-handed justice and avoid a technical construction of language which results in a windfall to the respondents. *Cf. United States v. Carolina Freight Carriers Corp.,* 315 U.S. 475. Furthermore, there is even a greater need for a fair construction of Section 218(a) since the result reached by the Court of Appeals is in derogation of the private contract rights of the parties.

CONCLUSION

The absence of a decision by this Court interpreting Section 218(a) of the Interstate Commerce Act and the resulting conflict in the Circuits make it important that the issue raised here be resolved.

For these reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16599

Argued November 21, 1967 Decided February 5, 1968

BOWSER AND CAMPBELL, a partnership, and LLOYD H. BOWSER and STELLA CAMPBELL, doing business as BOWSER AND CAMPBELL, a partnership,

Appellants,

v.

KNOX GLASS, INC., a corporation,

Appellee.

Appeal From the United States District Court for the Western District of Pennsylvania

Before: Hastie, Freedman and Van Dusen, *Circuit Judges.*

FREEDMAN, *Circuit Judge.*

This appeal presents the question whether a contract carrier may collect from its shipper the difference between its schedule of rates filed with the Interstate Commerce Commission and the lower rates it actually charged under its arrangement with the shipper which were inadvertently omitted from the schedule. The district court held that the carrier was barred from recovery. 264 F.Supp. 522 (W.D.Pa. 1967).

Plaintiff, a contract motor carrier regulated by the Interstate Commerce Act,[1] performed services for de-

1. Interstate Commerce Act §§ 201, et seq., 49 U.S.C. §§ 301, et seq.

fendant pursuant to contract. The contract presently involved was executed on May 12, 1958, and provided that the carrier should be compensated in accordance with the minimum rates fixed in a designated schedule of charges, its supplements and reissues. The schedule of charges, filed with the Interstate Commerce Commission, was issued on April 28, 1958, effective May 1, 1958, and was in effect during the period here involved. In practice the charges actually made and collected were less than those required by the scheduled rates but were what the parties had agreed upon. A small fee was charged for stops in transit, instead of treating each stop as an independent shipment and applying to it the applicable minimum rate as the schedule required. The district court found that the carrier inadvertently and mistakenly failed to file a schedule which would accord with the actual practice.

An investigation by the Interstate Commerce Commission disclosed the departures from the schedule of charges, and in consequence the Commission instituted successful criminal proceedings against the carrier and the shipper for violation of the Interstate Commerce Act. As a result of the investigation the carrier amended its schedule of charges effective January 25, 1964, to reflect the existing practice of the parties. Shortly after the criminal proceedings were instituted the present parties on August 21, 1964, entered into an agreement in which the carrier acknowledged that the charges it had collected were what it had in fact agreed upon with the shipper and therefore promised that it would make no claim for undercharges.

The carrier later brought the present action to recover from the shipper $26,978.32, constituting the undercharges for the period from January 24, 1960, which was free from the bar of the Pennsylvania statute of limitations.[2] After a nonjury trial the district court entered judgment in favor of defendant on the ground that it would be unconscionable to permit the carrier to recover. The court also reasoned that the amount of the undercharges would be cancelled out by the shipper's right to an equal amount as damages for the carrier's failure to file the proper rate, although no counterclaim for this had been pleaded by the shipper.

If plaintiff were a common carrier it clearly would be entitled to recover the undercharges regardless of the reason for the charge to the shipper of less than the rate filed with the Commission.[3] More than fifty years ago Mr. Justice Hughes in announcing the right of a common carrier to recover the undercharge from an innocent customer said: "Deviation from [the filed rate] . . . is not permitted upon any pretext. Shippers

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2. Act of March 27, 1713, 1 Sm.L. 76, § 1, as amended, 12 Purdon's Pa. Stat. Annot. § 31.

3. Section 217(b) of the Interstate Commerce Act applicable to common carriers by motor vehicle provides:

> "(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time . . . ." 49 U.S.C. § 317(b).

See the substantially identical § 6(7) applicable to railroads and other common carriers. 49 U.S.C. § 6(7).

. . . are charged with notice of it, and they as well as the carrier must abide by it. . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress. . . ." *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 97 (1915). Similarly, *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink*, 250 U.S. 577 (1919). This policy prevents the application of the doctrine of estoppel.[4]

The problem is whether the same result is required in the case of a contract carrier. The regulation of contract carriers is a relatively new development arising out of the use of motor vehicles. Motor carriers became subject to federal regulation by the Motor Carrier Act of 1935 amending the Interstate Commerce Act.[5] The statute requires contract carriers to file their rates with the Interstate Commerce Commission and in language substantially the same as that relating to common carriers proscribes the charging of a rate different from the filed rate.[6] The shipper urges upon us, however, that a distinction exists because the Interstate

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4. Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink, supra at 582-83.

5. Interstate Commerce Act §§ 201, et seq., 49 U.S.C. §§ 301, et seq.

6. Section 218(a) of the Interstate Commerce Act provides:

> "No such [contract] carrier shall demand, charge, or collect compensation for such transportation different from the charges filed in accordance with this paragraph. . . ." 49 U.S.C. §318(a).

Commerce Act contains a specific provision condemning discrimination among shippers by a common carrier[7] but makes no similar provision in relation to a contract motor carrier.[8] It points to the Supreme Court's recognition that the policy against discrimination by a common carrier among shippers is inherent in the purpose of the statute.[9]

It is true that the regulation of contract carriers is not designed to prevent discrimination among shippers, as it is in the case of common carriers. The pur-

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7. Section 216(d) of the Interstate Commerce Act, applicable to motor carriers, provides:

> "It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, . . . or description of traffic, in any respect whatsoever; or to subject any particular person; . . . or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description." 49 U.S.C. §316(d). See the substantially identical §3, par. (1) applicable to railroads and other common carriers.

8. Indeed, §218(a) of the Interstate Commerce Act provides:

> "Nothing herein provided shall be so construed as to require . . . [contract] carriers to maintain the same rates, rules and regulations for the same services for all shippers served. . . ." 49 U.S.C. §318(a).

9. Louisville & Nashville Railroad Company v. Maxwell, supra; Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink, supra.

pose in regulating contract carriers is to prevent destructive competition between contract carriers and common carriers and among the contract carriers themselves.[10] The statute therefore originally authorized the Commission to regulate only the minimum rates filed by contract carriers. [11] In 1957 the statute was amended to require contract carriers to file their

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10. See H.Rep. No. 895, 85th Cong., 1st Sess., 2 U.S. Code Cong. & Admin. News 1406 (1957); Ex Parte No. MC-12, Contracts of Contract Carriers, 1 MCC 628, 629-31 (1937); Statement by Senator Wheeler, explaining Motor Carriers Act, 79 Cong. Rec. 5657 (1935); Regulation of the Transportation Agencies, S.Doc. No. 152, 73d Cong., 2d Sess. 33-34 (1934); S.Rep. No. 482, 74th Cong., 1st Sess. 2 (1935).

11. Section 218(b) of the Interstate Commerce Act provides:

> "Whenever, after hearing, upon complaint or upon its own initiative, the Commission finds that any minimum rate or charge of any contract carrier by motor vehicle, or any rule, regulation, or practice of any such carrier affecting such minimum rate or charge, or the value of the service thereunder, for the transportation of passengers or property or in connection therewith, contravenes the national transportation policy declared in this Act, or is in contravention of any provision of this chapter, the Commission may prescribe such just and reasonable minimum rate or charge, or such rule, regulation, or practice as in its judgment may be necessary or desirable in the public interest and to promote such policy and will not be in contravention of any provision of this chapter. Such minimum rate or charge, or such rule, regulation, or practice, so prescribed by the Commission, shall give no advantage or preference to any such carrier in competition with any common carrier by motor vehicle subject to this chapter. . . ." 49 U.S.C. § 318(b).

actual charges as well as their minimum rates.[12] As a result, there was thus conferred on common carriers a right of knowledge and surveillance of the actual competition from contract carriers.[13]

The fact that the policies underlying the regulation of common carriers do not coincide completely with those relating to contract carriers must be considered in relation to the basis for permitting a carrier's recovery of undercharges. A common carrier's recovery of the preferential discount fully repairs the discrimination among its shippers by the deviation from its published tariff, whereas a contract carrier's recovery of a discount deviation from the published rate will not retrospectively return the business which may have been taken from a competing common carrier or retrospectively restore a common carrier rate which may have been depressed by the contract carrier's unlawful discount.

This difference, however, reflects only a partial factor and is not enough to justify a disregard of the general policy that the rate filed must be observed, a policy which pervades the regulation of contract as well as common carriers and which is enforced by permitting any undercharges to be recovered in order to preserve the integrity of the filed rates. In the case of both the common and the contract carrier the refusal to validate the economic distortion by such doctrines as agreement, estoppel or unclean hands is a deterrent weapon in the

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12. Act of August 13, 1957, P.L. 85-124, 71 Stat. 343, 49 U.S.C. § 318(a).

13. H.Rep. No. 895, 85th Cong., 1st Sess., 2 U.S. Code Cong. & Admin. News 1406, 1407 (1957).

enforcement of the statute and the public policy which underlies it. In the case of contract carriers it discourages pressure by powerful shippers for discounts, which create competition destructive to common carriers as well as to other contract carriers, by making it clear that the undercharges will accumulate and may always be recovered by the contract carrier within the period of the statute of limitations. For the same reason it also discourages the acceptance by shippers of discounts from contract carriers in the general course of competition.[14]

It is of no legal significance that the rate which the parties agreed upon among themselves would probably have been approved if it had been filed with the Commission. The forum for dealing with the schedule of charges is the Commission. Courts cannot in effect validate illegal rates long after the event, especially when in the interim the contract carrier's competitors — other contract carriers and common carriers — have relied upon the published charges.

The innocence of the shipper in relying upon the carrier to obtain approval of the rate they had agreed on is equally unavailing. The rate filed is a matter of public record of which the shipper must take notice at his peril. The hardship which is urged upon us is one which has already been dealt with in cases involving common carriers and has been found inadequate to alter the policy underlying the integrity of the schedule

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14. See Minton v. General Shale Products Corp., 52 Tenn. A. 60, 371 S.W.2d 808, 813 (1963); Johnston v. L. B. Hartz Stores, Inc., 202 Minn. 132, 277 N.W. 414, 416 (1938).

of charges.[15] Such instances of hardship may not be permitted to destroy the more far-reaching need to maintain respect for the rates established under the Commission's procedure and which other shippers and contract and common carriers alike must be able to rely upon as realistic facts rather than a screen which conceals illegal private practices.

Although the question has not often been presented under the federal statute, the view we take finds support in the few decisions which are reported.[16] In the several states where statutes regulate intrastate carriers and contain provisions quite similar to those of the Interstate Commerce Act, the unbroken trend of decisions is to the same effect.[17]

The applicable rule cannot be circumvented by the reasoning, which the district court accepted, that the failure to file the rate agreed on with the shipper amounted to a breach of contract for which the damages are to be measured at precisely the amount of the

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15. Louisville & Nashville Railroad Co. v. Maxwell, supra at 97; Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. v. Fink, supra at 582.

16. Minton v. General Shale Products Corp. supra. See Bottemueller v. Wilson & Co., 57 F.Supp. 766 (W.D. Mo. 1944); A & F Trucking Corp. v. Liggett Drug Company, 253 F.Supp 699 (S.D.N.Y. 1966).

17. Johnston v. L. B. Hartz Stores, Inc., supra; Papetti v. Alicandro, 317 Mass. 382, 58 N.E.2d 155 (1944); Butler v. Bell Oil & Refining Co., 70 Cal. App. 2d 728, 161 P.2d 559 (1945); Hawley v. Little Falls Mill & Mercantile Co., 200 Minn. 165, 19 N.W.2d 161 (1945). See Steele v. General Mills, Inc., 329 U.S. 433 (1947); W. S. Dicky Clay Mfg. Co. v. Corder, 310 F.2d 764 (5 Cir.), cert. dismissed, 373 U.S. 908 (1963).

undercharges, thus eliminating the carrier's claim. In fact, the shipper filed no counterclaim for such damages. But regardless of this procedural element, to recognize a shipper's right to such damages would be to destroy the established principle by a change in form of the defense. Such a defense would not be available in an action by a common carrier,[18] and since we have determined that the same principle must be maintained as to preferential charges by a contract carrier, it follows that the defense must be equally unavailing in the present action.

The judgment of the district court in favor of the defendant and against the plaintiff will be reversed and the cause remanded for further proceedings consistent with this opinion.

VAN DUSEN, *Circuit Judge, concurring.*

The schedule of rates filed with the I.C.C. inadvertently omitted the provision, agreed to and followed by the parties, granting the shipper the privilege to stop a shipment to complete loading for an agreed charge of $6, later $10, for each additional stop. (Findings 8 and 9 on PP. 291A-292A and 24 on PP. 295A-296A) These charges were paid to the appellee carrier even though they were not specified in the filed tariff (Findings 16 at P. 293A). The tariff of at least two other common carriers in the area during the years in

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18. Illinois Central Railroad Co. v. Henderson Elevator Co., 226 U.S. 441 (1913); Pettibone v. Richardson, 126 F.2d 969 (7 Cir. 1942); T & M Transp. Co. v. S. W. Shattuck Chemical Co., 148 F.2d 777 (10 Cir. 1945); F. Burkhart Mfg. Co. v. Fort Worth & D. C. Ry. Co., 149 F.2d 909, 910 (8 Cir. 1945).

question (1960-1964) provided for the privilege of stopping in transit to complete loading with a charge of $10 for each stop. (Findings 12-15 on PP. 292A-293A).

No destructive competition could have resulted in this situation from charging the rates agreed to and followed by the parties since they were identical to the rates being charged by other common carriers. There seems no reason why 49 USC 318 should not be construed in accordance with the rule that a statute should be interpreted in each case in the light of the mischief congress sought to remedy and the object it wishes to attain. See *City of Newark v. United States,* 254 F. 2d 93, 97-98 (3rd Cir. 1958), and U. S. Supreme Court cases there cited, where this court said at P. 97:

> "A situation not within the intention of the enacting body, though it is within the letter of the statute, is not within the statute."

The cases cited in footnote 16 above involved deliberate attempts to evade the published tariffs.

In view of the unusual circumstances in this record, the appellee may well seek by petition for a writ of certiorari authorization from the Supreme Court of the United States to reach the fair and just result achieved by the opinion of the able district judge in spite of the sweeping language of the Supreme Court of the United States' decisions cited in the opinion of this court, which language I believe is binding on this court.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 16,599

BOWSER AND CAMPBELL, a partnership, and LLOYD H. BOWSER and STELLA CAMPBELL, doing business as BOWSER AND CAMPBELL, a partnership, *Appellants,*

vs.

KNOX GLASS, INC., a corporation, *Appellee.*

Appeal From the United States District Court for the Western District of Pennsylvania

Present: HASTIE, *Chief Judge*, and FREEDMAN and VAN DUSEN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 20, 1967, be, and the same is hereby reversed, with costs, and the cause is remanded for further proceedings consistent with the opinion of this Court.

ATTEST:
THOMAS F. QUINN
Clerk

February 5, 1968

APPENDIX C

Findings of Fact, Conclusions of Law and Order of United States District Court Dated February 20, 1967

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 66-106

BOWSER AND CAMPBELL, a partnership, and LLOYD H. BOWSER and STELLA CAMPBELL, doing business as BOWSER AND CAMPBELL, a partnership,
Plaintiffs,

v.

KNOX GLASS, INC., a corporation,
Defendant.

February 20, 1967

Marsh, *District Judge.*

In this action the plaintiffs, Bowser and Campbell, individually and as a partnership, doing business as a contract motor carrier, seek to recover $26,978.32[1] additional charges for transporting glassware and cartons from the defendant, Knox Glass, Inc. After non-jury trial, the court makes the following:

FINDINGS OF FACT

1. Plaintiffs in this action are Bowser and Campbell, a partnership, and Lloyd H. Bowser and Stella Campbell, individuals, doing business as Bowser and Campbell, a partnership, hereinafter called Carrier.

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1. The agreed amount of the claim (T., pp. 9-10; plaintiffs' Ex. 3). Freight charges alleged to be due prior to January 24, 1960 are barred by the Statute of Limitations.

2. Defendant, Knox Glass, Inc. (Knox), is a corporation organized under the laws of the State of Pennsylvania, and has its principal office in Knox, Pennsylvania.

3. At all relevant times, Carrier was a contract motor carrier regulated by the applicable provisions of the Interstate Commerce Act, and as such contracted with Knox to haul its products from Knox, Marienville, Parker, Oil City, Kane and Sheffield, all points of origin in Pennsylvania, to destination points in Ohio and New York. Knox was a manufacturer of glassware with manufacturing facilities located at Knox, Marienville and Parker, Pennsylvania, and warehouse facilities at Kane and Sheffield, Pennsylvania.

4. The several shipments of glassware and empty packing cartons shown on plaintiffs' Exhibit 2 were made by Knox as shipper and hauled by Carrier as a contract carrier.

5. During the period of time here involved, Carrier performed services as a contract motor carrier for Knox pursuant to a written transportation agreement dated May 14, 1958, executed by both parties, Carrier and Knox (defendant's Ex. F).

6. The transportation agreement (Ex. F) provided that the Carrier would be compensated for transportation service in accordance with "'MC 1218, MF-I.C.C. No. 3 Schedule of Charges for Transportation as a Contract Carrier', supplements thereto and reissues thereof."

7. "MC 1218, MF I.C.C. NO. 3 SCHEDULE OF CHARGES FOR THE TRANSPORTATION, AS A CONTRACT CARRIER" was issued April 28, 1958, effective May 1, 1958 (plaintiffs' Ex. 1; defendant's Ex. C). This schedule was in effect during the period of time here involved. The schedule did not contain a written rule or regulation affording Knox the privilege of stopping a shipment to complete loading. (See: Ex. C, p. 4, Item 40(A).)

8. Despite the absence in the Schedule of Charges of a regulation allowing the privilege of stopping in transit, the Carrier, as a contract motor carrier, during the period of time here involved and prior thereto, had afforded Knox and its predecessor, Knox Glass Associates, Inc., stopping for loading and unloading privileges in connection with the movement of the Knox products.

9. For all of the shipments shown on Carrier's Exhibit 2, Knox paid Carrier an agreed charge of $6, later $10, for additional stops at the Pennsylvania Knox plants to complete loading of goods. The freight charges were always computed on the aggregate weight of the shipment in Carrier's truck as it proceeded to destination. (Pretrial Stipulation, p. 3; T., pp. 56-57; plaintiff's Exs. 2, 4, 5, 6, 7.)

10. In the agreement executed between Carrier, by Harold R. Bowser, its authorized representative, and Knox, dated August 21, 1964 (defendant's Ex. G), Carrier admitted that the freight charges which it collected from Knox during the period involved in this suit were

the charges agreed upon by the parties.[2] In addition, Mr. Bowser, appearing as a witness for Carrier, admitted in his testimony that the charges collected were the charges which Carrier had intended to charge and which the parties had agreed upon.

11. The Schedule of Charges MC 1218, MF I.C.C. NO. 3 (defendant's Ex. C) was supplemented effective January 25, 1964, to provide a published rule permitting defendant to stop a shipment to complete loading (defendant's Ex. D) in conformity with the long-existing understanding, billing practice, and the actual contract between the parties.

12. During the period involved in these proceedings, there were other motor carriers, including W. I. Womeldorf & Sons, a common carrier used by Knox for the same type of transportation and in the same areas for which Carrier's services were employed by Knox (T., pp. 71-73).

13. W. I. Womeldorf & Sons, according to its tariff effective July 28, 1960, provided common carrier truck service for hauling glass containers and cartons from points in Pennsylvania to points in Delaware, Maryland, New Jersey and New York (defendant's Ex. I).

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2. It is stated in Exhibit G, p. 2: "[T]hat both B&C [Carrier] and Knox agree that the charges so paid and collected [for more than 30 years] were based on rates, rules and provisions mutually desired, intended and agreed upon, and, accordingly, the charges so paid are considered by both to have been those actually contracted for."

14. The common carrier tariff of Womeldorf provided the same basic level of rates and resulting charges as were paid by Knox to Carrier. In addition, Womeldorf's tariff provides the privilege of stopping in transit to complete loading with a charge of $10 for each stop-off (defendant's Ex. I, Rule No. 8, Stopping-in-Transit).

15. The tariff of another common carrier, Motorway Corporation (defendant's Ex. J), likewise provides a competitive rate to points in Ohio. The Motorway Corporation's tariff (Ex. J, Item 50) provides a stop-off privilege to complete loading at a charge of $10 per stop.

16. Carrier collected $6, and later $10, for additional stops at the Knox plants to complete loading, although this was not specifically provided in its filed Schedule (Ex. C).

17. During an investigation by representatives of the Interstate Commerce Commission in the latter part of 1963, Carrier was "ordered" to collect undercharges from Knox, because the investigation disclosed that Carrier's billings were based on aggregate weight, regardless of the number of points of origin where additional stops to pick up freight were made, in disregard of the provisions in the Schedule of Charges (defendant's Ex. C, Item 40(A)). Subsequently, Carrier amended its Schedule of Charges, effective January 25, 1964 (Ex. D) to reflect the actual contract between and the existing conduct and practice of the parties. Despite this amendment, separate criminal proceedings were filed by the Interstate Commerce Commission

against Carrier in March, 1964, and against Knox in June, 1964, alleging violations of the Interstate Commerce Act prohibiting collection and payment of less than published charges (T., pp. 94-110).

18. Because of the criminal actions, Knox consulted S. Sidney Eisen, Esquire, a transportation consultant, who after meeting with representatives of Carrier and the Interstate Commerce Commission prepared an agreement wherein Carrier acknowledged that the charges which had been collected were the charges the parties had agreed upon and further released Knox from any future claim for such charges (defendant's Ex. G; T., pp. 115-116).

19. Pursuant to the conferences with the Interstate Commerce Commission and the terms of the agreement (Ex. G), Knox entered a plea of nolo contendere in the criminal action brought against it by the Interstate Commerce Commission (T., pp. 111-112).

20. Because of alleged "pressures" for collection of undercharges which Carrier claims were being exerted by representatives of the Interstate Commerce Commission, Mr. Eisen arranged a meeting with representatives of the Interstate Commerce Commission in Washington on November 10, 1964, where Mr. Bowser and his counsel were informed that the Interstate Commerce Commission was not concerned with Carrier's pursuing a claim for the undercharges (T., pp. 119-122).

21. The only occasions that a representative of the Interstate Commerce Commission made any statements about collection of undercharges was in the latter part of 1963, which was prior to the time of the filing of the

criminal actions, prior to the time of the amendment to the Schedule of Charges (Ex. D), and prior to the time of the agreement between the parties (Ex. G), and their meeting on November 10, 1964 with the representatives of the Comission in Washington, D. C. Carrier seems to justify bringing this civil action because of alleged threats of criminal penalties made in 1963 by employees of the Interstate Commerce Commission Motor Vehicle Bureau if Carrier did not institute suit to collect the additional transportation charges.

22. The criminal charges brought against Carrier in March, 1964, referred to in Finding 17, were disposed of in 1964. The complaint in this action was filed on January 21, 1966, a time when there was no realistic threat of further criminal prosecution. We do not give any credence to Mr. Bowser's testimony indicating that pressures of the representatives of the Interstate Commerce Commission were responsible for bringing this civil action. (T., pp. 141, 143, 149-152.)

23. The freight charges involved in this action billed by Carrier and paid by Knox, including the charges for stopping in transit at the Pennsylvania Knox plants to complete loading were in accord with the contract between the parties.

24. In the publication of Carrier's MC 1218, MF I.C.C. NO. 3 Schedule of Charges in effect at the time involved in this proceeding (Ex. C), Carrier inadvertently and mistakenly failed to include or see to the inclusion of a rule whereby shipments subject to truckload rates set out in the Schedule of Charges may be stopped at points of origin for partial loading, and the

application rate on such shipments will be the truckload rate provided in the Schedule.[3] *Cf.* with the amendment to the Schedule, Exhibit D, Item 40(A), supplementing Exhibit C.

25. In the agreement between the parties dated August 21, 1964 (Ex. G), Carrier agreed it would not make any claim for alleged undercharges against Knox.[4]

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3. The parties agreed, inter alia: "[T]hat upon passage of interstate motor carrier regulation, the oral arrangements and agreements, as aforesaid, were sought to be reduced to writing, and, as most pertinent here, the rates and charges as well as the rules and regulations applicable in connection with them were to be published by B&C [Carrier] in a Schedule of Minimum Charges; that, in effecting such publication, B&C inadvertently omitted complete provisions relating to the stopping in transit to complete loading at the various Knox plants in Pennsylvania; that neither B&C nor Knox were aware of such omission and both, respectively, billed, received and paid freight charges based upon arrangements and agreements that always were intended and understood to be in effect; and, that both B&C and Knox agree that the charges so paid and collected were based on rates, rules and provisions mutually desired, intended and agreed upon, and, accordingly, the charges so paid are considered by both to have been those actually contracted for." (Ex. G.)

4. Paragraph "3" of Exhibit G provides: "B&C [Carrier] agrees that it will not, at any time, either now or in the future, make any claim or charge of any kind or nature that the inadvertently published Schedule of Minimum Charges, rather than the mutual agreements or arrangements, reflect the correct and proper rates and freight charges and, accordingly, B&C further agrees that it will not, at any time, either now or in the future, make any claim for alleged undercharges with respect to the freight charges assessed by it against Knox, and so paid by Knox, for the transportation of

DISCUSSION

It is clear that absent the Interstate Commerce Act, § 318(a), Title 49 U.S.C.A., this contract action would result in judgment for the defendant, Knox.

The evidence clearly shows that the written agreement (Ex. F) and the Schedule of Charges incorporated therein did not express what the parties intended, and that what the parties intended was omitted therefrom inadvertently and by mistake. By clear, precise and convincing evidence, it was proved that Carrier, which seeks to enforce the Schedule of Charges, a part of the written agreement, has admitted and acknowledged that it did not express in the Schedule of Charges what the parties intended, and that what the parties intended was omitted from the Schedule of Charges by inadvertence and mistake. See: *Dunn v. Orloff,* 218 A. 2d 314 (1966); *In re Boyd's Estate,* 146 A. 2d 816 (1958); *Ward v. Zeigler,* 132 A. 798 (1926).

Moreover, the contract carrier was required by law to file with the I.C.C. a rate schedule in conformity with the actual contract made with Knox. Since the filing of a correct tariff was its sole responsibility, Carrier's failure to do so was a breach of its contractual duty to Knox. To the extent that Knox was damaged thereby, it would be entitled to damages from Carrier, thus negating any undercharges to which Carrier might be entitled if the strict rule applicable to common carriers by rail should be applied.

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its products and, more particularly, the stopping of shipments in transit at the Knox plants located in Pennsylvania to permit the completion of loads."

Despite its admission and agreement not to make any claim for alleged undercharges, and its unvarying conduct over the years in billing Knox according to the actual contract between the parties, and despite the unconcern of the I.C.C., Carrier contends that it is entitled to recover from Knox the difference between the transportation charges actually paid and the charges computed on the basis of the filed, albeit erroneous, Schedule of Charges (Ex. C). It contends that under the law no act or omission on its part may estop it from collecting less than the filed charges. In short, it insists that the law of contracts and equity must give way to the statutory requirement as is the case if Carrier were a common carrier.[5] We do not agree.

Under the facts and circumstances of this case, we think the intentions of the parties expressed by the parol terms of their private contract, and the disclaimer of Carrier, should prevail.

Contract carriage is grounded on individual contracts between shippers and contract carriers. It is not based on a continuing offer to provide service to the general public, as is common carriage. Common carriage

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5. Pittsburgh etc. Ry. Co. v. Fink, 250 U.S. 577 (1919); Louis. & Nash. R. R. v. Maxwell, 237 U.S. 94 (1915); Atchison etc. Ry. Co. v. Robinson, 233 U.S. 173 (1914); Penna. R. R. Co. v. International Coal Co., 230 U.S. 184 (1913). We think it is probable that the law settled as to common carriers in interstate commerce by rail would apply to common carriers by motor vehicle. (Section 317(b), 49 U.S.C.A.) But see, National Van Lines v. United States, 355 F. 2d 326 (7th Cir. 1966), where contractual principles were applied in a common motor carrier case.

is regulated to protect the public from price discrimination; contract carriage is regulated to protect common carriers from cut-throat competition by contract carriers (§ 318(b), 49 U.S.C.A.). Subject to that limitation, contract carriage is special and individual; its purpose is to meet the needs of the particular shipper. Thus the shippers need not look at the rates filed by the contract carrier, whereas the shipper by common carrier is absolutely bound by the filed tariff of the common carrier.

Since the rates actually charged Knox by Carrier were competitively comparable to those charged by common carriers operating in the vicinity, it is obvious why the I.C.C. expressed no concern in any action to enforce collection of the alleged undercharges. No common carrier was injured competitively by Carrier's mistake. On the other hand, if the rates mistakenly filed by Carrier were enforced by this court, not only would effect be given to Carrier's mistake and omission, but it would also enable Carrier to collect exorbitant rates for past services far in excess of those charged by common carriers offering similar services during the same period.

It is our opinion that in this action between parties to contract carriage, as distinguished from common carriage, contract principles should be applied in determining their rights and liabilities and not the rates filed in the erroneous Schedule of Charges. Accordingly, judgment will be entered in favor of Knox.

CONCLUSIONS OF LAW

1. This court has jurisdiction to hear and determine this action, which arises under an Act of Congress regulating commerce, i.e., the Interstate Commerce Act, 28 U.S.C. § 1337.

2. Carrier as a contract carrier was responsible under the Interstate Commerce Act for preparing and filing with the Interstate Commerce Commission a correct Schedule of Charges in accordance with its contract with the shipper, Knox.

3. The failure by Carrier to publish a correct Schedule of Charges does not subject the defendant Knox to liability for payment of additional charges in accordance with an erroneous Schedule where both the shipper and the carrier agree that the Schedule does not reflect the contract between the parties.

4. Although the Interstate Commerce Act provides that a contract carrier shall not charge less than the rates specified in its schedule of charges, this provision does not subject a shipper to liability to the contract carrier for payment of schedule charges which carrier admits are incorrect.

5. Decisions of the Interstate Commerce Commission and legislative history of the Interstate Commerce Act clearly demonstrate that the purpose of contract carrier regulation is to protect the common carrier.

6. So far as the purposes of economic regulation of contract carriage are concerned they were completely satisfied by the freight charges published by Carrier

(although incomplete by reason of the mistaken or inadvertent omission of the stoppage in transit rule) in view of the rates filed by the common carriers, W. I. Womeldorf & Sons and Motorway Corporation.

7. In view of all of the facts in this case, to permit Carrier, a contract motor carrier, to recover additional hauling charges based upon its admittedly erroneously published Schedule of Charges would unduly and unconscionably enrich Carrier who is responsible for publishing such Schedule of Charges. Such a result would be contrary to the purposes and principles of those sections of the Interstate Commerce Act which regulate contract motor carriers.

8. Judgment should be entered in favor of the defendant Knox.

Order of Court

AND NOW, to-wit, this 20th day of February, 1967, after trial to the court, IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the defendant, Knox Glass, Inc., and against the plaintiffs, Bowser and Campbell, a partnership, and Lloyd H. Bowser and Stella Campbell, doing business as Bowser and Campbell, a partnership; costs to be borne by the plaintiffs.

/Signed/ RABE F. MARSH
United States District Judge

APPENDIX D

Statute Involved

SECTION 218(a), INTERSTATE COMMERCE ACT, PT. II, ADDED BY 49 STAT. 561 (1935), AS AMENDED, 49 U.S.C. § 318(a)

§ 318. *Schedules of contract carriers by motor vehicle —Establishment, filing, and publication of schedules and rules affecting rates; notice of and hearing on proposed changes; undue preferences*

(a) It shall be the duty of every contract carrier by motor vehicle to establish and observe reasonable minimum rates and charges for any service rendered or to be rendered in the transportation of passengers or property or in connection therewith, and to establish and observe reasonable regulations and practices to be applied in connection with said reasonable minimum rates, fares, and charges. It shall be the duty of every contract carrier by motor vehicle to file with the Commission, publish, and keep open for public inspection, in the form and manner prescribed by the Commission, schedules containing the actual rates or charges of such carrier for the transportation of passengers or property in interstate or foreign commerce, and any rule, regulation, or practice affecting such rates or charges and the value of the service thereunder: *Provided,* That any contract carrier serving but one shipper having rendered continuous service to such shipper for not less than one year may file reasonable minimum rates and

charges unless the Commission in any individual case, after hearing, finds it in the public interest to require the filing of actual rates and charges. No such contract carrier, unless otherwise provided by this chapter, shall engage in the transportation of passengers or property in interstate or foreign commerce unless the actual rates or charges for such transportation by said carrier have been published, filed, and posted in accordance with the provisions of this chapter. Nothing herein provided shall be so construed as to require such carriers to maintain the same rates, rules and regulations for the same services for all shippers served. No reduction shall be made in any such charge either directly or by means of any change in any rule, regulation, or practice affecting such charge or the value of the service thereunder, nor shall any new charge be established, except after thirty days' notice of the proposed change or new charge filed in the aforesaid form and manner but the Commission may, in its discretion and for good cause shown, allow such change upon less notice, or modify the requirements of this subsection with respect to posting and filing of such schedules, either in particular instances, or by general order applicable to special or peculiar circumstances or conditions. Such notice shall plainly state the change proposed to be made and the time when such change will take effect. No such carrier shall demand, charge, or collect compensation for such transportation different from the charges filed in accordance with this paragraph, as affected by any rule, regulation, or practice so filed, or less than the minimum rate or charge as may be prescribed by the Commission from time to time, and it shall be unlawful for any such carrier, by

the furnishing of special services, facilities, or privileges, or by any other device whatsoever, to charge, accept, or receive compensation different from the actual rates and charges so filed, or less than the minimum charges so prescribed: *Provided,* That any such carrier or carriers, or any class or group thereof, may apply to the Commission for relief from the provisions of this subsection, and the Commission may, after hearing, grant such relief to such extent and for such time, and in such manner as in its judgment is consistent with the public interest and the national transportation policy declared in this Act.